SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY, Plaintiff/Petitioner, vs. METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA, et al. Defendants/Respondents.	Case No. CFP-10-510830 Case No. CFP-12-512466 ORDER GRANTING SAN DIEGO'S MOTION FOR PREJUDGMENT INTEREST

I have previously found that the Metropolitan Water District of Southern California (Met) breached its Exchange Agreement with the San Diego County Water Authority (San Diego) and awarded San Diego nearly $200 million in damages, "plus interest." Phase II Statement of Decision, 29. San Diego now moves for prejudgment interest, seeking an additional $44,139,469.[1] I heard argument October 8, 2015.

Legal Background

Civil Code § 3287(a) provides that "[e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day...."

[1] San Diego initially requested $47,277,747, but modified the request after Met pointed out a timing error. Opposition, 12-13; Reply, 1. I have further reduced this to a small extent to account for Met's further calculations. See n.8 below.

Section 3289 provides that when a contract "does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach." The dispute here centers on whether § 12.4(c) of the Exchange Agreement "stipulate[s] a legal rate of interest." The parties also disagree as to whether the damages awarded were "certain" or "capable of being made certain."

The Agreement's Language

Section 12.4(c) of the Exchange Agreement reads:

> In the event of a dispute over the Price, SDCWA shall pay when due the full amount claimed by Metropolitan; provided, however, that, during the pendency of the dispute, Metropolitan shall deposit the difference between the Price asserted by SDCWA and the Price claimed by Metropolitan in a separate interest bearing account. If SDCWA prevails in the dispute, Metropolitan shall forthwith pay the disputed amount, plus all interest earned thereon, to SDCWA. If Metropolitan prevails in the dispute, Metropolitan may then transfer the disputed amount, plus all interest earned thereon, into any other fund or account of Metropolitan.

Met says § 12.4(c) establishes a legal rate for purposes of § 3289 and so the 10% statutory rate does not apply. It asserts that the interest bearing account prescribed by § 12.4(c) has accrued interest of $4,156,907.46 – the maximum interest to which SDCWA could be entitled. *Id.* at 2:1-3.

But at argument, Met explained that it had set aside less than the damages awarded.[2] So, it has now in effect retrospectively increased the principal set aside amounts over the period of the dispute to reach the awarded damages, and then Met has recalculated interest using whatever interest Met had, historically, obtained on the set-side money. Thus, Met now proposes to give San Diego not, as § 12.4(c) suggests, "all interest earned thereon" i.e. the interest historically

[2] This is not shocking. As I noted in my earlier discussion of § 12.4(c) when San Diego unsuccessfully presented it as a liquidated damages provision, there is no reason to think that money set aside under § 12.4(c) would perfectly match the damages award.

earned on the set-aside money, but *more* money to account for the damages which Met had *not* set aside. This is the first signal that Met's proffered understanding § 12.4(c) is not correct.

Met argues both in its papers and at argument that that if I do not accept its reading, the phrase "shall forthwith pay . . . all interest earned thereon" is meaningless. E.g., Opposition at 5. I do not agree. The clauses on interest, just like the remainder of the section, as I have previously interpreted it, are all designed to increase the odds that there will be money available to pay damages. Just as it is wise to set aside principal for potential future damages, so too it is wise to insist on an interest bearing account to account for the devaluation of money over time. Met's reading is not necessary to give meaning to the terms.

And this leads to the central problem with Met's view. I have previously found, at Met's urging, that § 12.4(c) was a security provision, not a damages provision. The provision's "primary purpose . . . was to prevent either side from spending disputed funds during the pendency of a dispute and to ensure that disputed funds were promptly available to the prevailing party upon the resolution of a dispute." Phase II SOD at 7. One reason for this conclusion was that, if read as a damages provision, SDCWA would be able to "fix extraordinarily high damages through the simple expedient of *claiming* extraordinarily high damages." *Id.* The same logic applies to the interest clause here.

Met's view is that the contract requires prejudgment interest generated on an amount that may be totally different than the damages actually awarded. That's not reasonable; as I note above, even Met does not so calculate interest.[3]

Met also argues that extrinsic evidence shows the parties meant this clause to reflect their agreement on applicable interest. Met notes communications between the parties in 2011 and

[3] That is, Met now adds more interest to account for the actual damages awarded; and I suppose, if I had awarded *less* than the set-aside, Met would nevertheless would not have turned over to San Diego either the full amount set aside nor "all interest earned thereon".

2012 indicated that the disputed money was being set aside and would earn interest "using the effective yield earned . . . on Metropolitan's investment portfolio." *Id.* at 7, citing Soper Decl., ¶3, Ex. B. San Diego, Met stresses, did not object to this characterization. *Id.* [4] San Diego retorts that its failure to object to Met's communications does not constitute "acceptance" of a "stipulated rate." Reply, 4. I agree. See e.g., *Unocal Corp. v. United States*, 222 F.3d 528, 542 (9th Cir. 2000) (interest rate unilaterally placed in invoice is not a stipulated legal interest rate under § 3289). I agree.

Met also suggests that even if the contract is ambiguous, extrinsic evidence shows the parties' "intent that the interest to be paid would be the interest earned in the interest bearing account." Opposition at 9. But this is not so. Met's evidence is just that it informed San Diego that it would comply with § 12.4(c) by placing disputed funds in a separate account, and that San Diego did not object. *See* Opposition at 7-8.

Judicial Estoppel

San Diego suggests Met is barred by judicial estoppel. See generally, *Jackson v. Cnty. of Los Angeles*, 60 Cal.App.4th 171, 181 (1997); *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* 36 Cal. 4th 412, 422 (2005). Met had previously insisted that § 12.4(c) was a security deposit and did not pertain to damages at all. I agreed; § 12.4(c) only served to prevent either side from spending disputed funds. But Met has not taken two positions which are "totally inconsistent," 60 Cal.App.4th at 183. It is at least conceivable that § 12.4(c) both acted to secure some money towards damages *and* set forth the parties' agreement on interest calculation.

[4] Met also notes that San Diego's second and third amended complaints requested interest "as a result of the express term in section 12.4(c) . . . ." *Id.*, citing Emanuel Dec., Ex. 4, ¶4. The same request appeared in San Diego's June 2012 lawsuit. *Id. Nesbit v. MacDonald*, 203 Cal. 219, 222 (1928) notes "a prayer for 'interest,' without specifying the rate, is deemed a prayer for legal interest" – here, set at 10 percent by statute. I do not take these allegations as reasonable evidence that the parties had agreed to calculate interest as Met now claims.

But, while I do not think judicial estoppel applies to actually block Met's position now, as I have noted the logic of my earlier ruling does refute it.

Certainty

San Diego must show that the damages I awarded were "certain, or capable of being made certain" under § 3287(a). Met tells us that this means San Diego must show there was "no dispute as to the computation of damages." Opposition at 9, citing *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal.App.3d 1154, 1173 (1991). Because "the parties vigorously disputed the computation," Met continues, there could not have been certainty. Opposition at 2. If this were so, a party could avoid prejudgment interest merely by contesting damages at trial.

As San Diego notes cases distinguish between disputes over the measure of damages and the absence of data necessary to allow the defendant to calculate damages. Only the latter makes damages uncertain. Reply, 6. *Howard v. Am. Nat. Fire Ins. Co.*, 187 Cal.App.4th 498, 535 (2010) ("test for determining certainty under section 3287(a) is whether the defendant knew the amount of damages owed to the claimant or could have computed that amount from reasonably available information...") See also, *Collins v. City of Los Angeles*, 205 Cal.App.4th 140, 151 (2012).

Here I awarded exactly the amount of damages requested by San Diego. The calculation was as San Diego suggested, a simple deduction of some sums from others. The calculation was just "math" as Met's counsel noted.[5] Met had all the information it needed to determine the degree of the overcharges; indeed, the data came from Met. See *Chesapeake Indus., Inc. v. Togova Enterprises, Inc.*, 149 Cal. App. 3d 901, 907 (1983) (prejudgment interest awarded if defendant "from reasonably available information could ... have computed" damages). Thus

[5] See also TR 1913-1914 (San Diego's math correct, according to Met witness).

these damages were "capable of being made certain" and San Diego is entitled to prejudgment interest.

In its papers, Met confronts San Diego with its earlier statements that damages were difficult to quantify, statements made in connection with its liquidated damages argument on § 12.4(c). Met is accurate,[6] but after I rejected its position San Diego changed its theory, and as Met counsel agreed at argument, changes in damages theory do not demonstrate that damages are uncertain.[7]

At argument Met emphasized its concerns that the damages here were uncertain in the sense that they were a function of deduction of uncertain amounts of charges, that it was never clear exactly what portion of certain charges could (had Met properly calculated them) be billed to San Diego. Perhaps; but it was San Diego's theory, repeated in communications to Met before litigation and found in statements made during this case, that any such uncertainty was not its problem; that it should not be required to pay those charges unless they were justified, that they were not justified, and thus they should all be deleted from San Diego's bill. My finding that Met might have been able to justify some unknown portion of the challenged charges, but in the event did not do so, is not a demonstration that the damages were uncertain. Of course Met disputed both damages (including maintaining the position that the court was without power to calculate them) as well as San Diego's damage theories (not to speak of its liability theories) but not the facts used to calculate the damages.

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[6] It is literally accurate to note San Diego's argument that damages could be difficult to quantify, but the situation was then more nuanced: San Diego was arguing that, *absent a liquidated damages* provision, damages could be or were difficult to quantify, and so urged liquidated damages—which would have been exceedingly certain. San Diego has not, I think, ever urged a theory of damages which is uncertain. See n.7.

[7] The fact that a court might have to select among damages models does not mean the damages awarded are not "capable of being made certain." *Children's Hosp. & Med. Ctr. v. Bonta*, 97 Cal. App. 4th 740, 774 (2002). San Diego presented essentially two models, one of which I rejected; Met presented none, and each of San Diego's models was "capable of being made certain."

The test may be focused this way: damages are not 'certain' when to fix damages, the court is required to resolve (aside from the liability issues) "disputed facts," *Collins v. City of Los Angeles*, 205 Cal. App. 4th 140, 151 (2012) or "conflicting evidence," Dennis L. Greenwald, CALIFORNIA PRACTICE GUIDE: REAL PROPERTY TRANSACTIONS 11:134.2 (2014). While one can imagine that I might have had to resolve disagreements on exactly how much of a rate ought to have been included in San Diego's bills (because, for example there was disagreement on how much to allocate to supply (compare Met's Opposition at 10:20)), in the event, I did not. No party wanted to lead me down that path. These sorts of conflicts were avoided, and not presented to me for resolution, by the parties' approaches to damages.

Conclusion

San Diego's motion for prejudgment interest is granted. The parties agree that, using the 10 percent rate, the interest is $43,415,802.[8]

Dated: October 9, 2015

Curtis E.A. Karnow
Judge Of The Superior Court

[8] The parties agree that at 10% this is the minimum to which San Diego is entitled. Reply at 10:3-26.

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On OCT 9- 2015 , I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: OCT 9- 2015

T. Michael Yuen, Clerk

By: _____
DANIAL LEMIRE, Deputy Clerk